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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN RESPONSE TO CALIFORNIA'S OPENING BRIEF AND IN SUPPORT OF THE UNITED STATES' MOTION FOR A THIRD SUPPLEMENTAL DECREE

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JURISDICTION

This suit began when the United States filed a complaint against California invoking the Court's original jurisdiction under Article III, Section 2 of the Constitution. That complaint led to the Court's order and decree in *United States* v. *California*, 332 U.S. 19; 332 U.S. 804. The United States filed a bill in equity in 1963 which resulted in the Court's supplemental decree in *United States* v. *California*, 381

U.S. 139; 382 U.S. 448. Both decrees reserved jurisdiction to enter advisable or necessary further orders.

California has invoked the Court's jurisdiction in moving for entry of a supplemental decree. The United States has opposed that motion and moved for entry of its own supplemental decree.

QUESTIONS PRESENTED

1. Whether the United States by presidential proclamation in 1949 reserved the waters, submerged lands and natural resources within one mile of the Channel Islands National Monument.

2. If so, whether the United States relinquished those areas to the State of California in the Submerged Lands Act of 1953.

STATUTES AND ORDERS INVOLVED

Presidential Proclamation No. 2825 is set forth at pp. 67-68 of the Joint Appendix. Pertinent provisions of the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, are set forth at pp. 89-92 of California's Opening Brief.

STATEMENT

On April 26, 1938, President Roosevelt, acting under the Antiquities Act of 1906, 34 Stat. 225,[1] set

[1] That Act provides in relevant part (16 U.S.C. 431):

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and

aside Anacapa and Santa Barbara Islands, lying about 15 miles off the coast of California near Los Angeles, as the Channel Islands National Monument.[2] Proclamation No. 2281, 52 Stat. 1541, set forth at Joint Appendix ("Jt. App.") 7-8. It is undisputed that the islands were part of the public land of the United States before 1938 and that they have remained so.

In 1945 the United States brought this suit to determine dominion over the submerged lands and mineral resources off the coast of California. Neither the parties nor the Court gave particular consideration at that time to the Channel Islands. In 1947 the Court concluded that the United States had an interest superior to that of California in the offshore submerged lands and resources, *United States* v. *California*, 332 U.S. 19 (*California I*), and decreed, 332 U.S. 804, 805:

> The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of

> other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments • • •.

[2] Anacapa Island is actually three contiguous islets totalling about 700 acres, and Santa Barbara Island is about 638 acres (Jt. App. 7-8; see map at Jt. App. 68). Small areas of each island were retained for lighthouse use and not made part of the Monument, but that retention has no relevance here.

> the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles * * *. The State of California has no title thereto or property interest therein.

Shortly thereafter, in 1949, President Truman enlarged the Channel Islands National Monument from Anacapa and Santa Barbara Islands themselves to include "the areas within one nautical mile of the shoreline" of those islands (Proclamation No. 2825, 63 Stat. 1258, set forth at Jt. App. 67-68). The scope of this proclamation is the central issue of the present proceedings.

In 1953, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, which relinquished to the states all rights, title and interest which the United States had in lands beneath navigable waters within three miles of the states' coastlines. However, the United States expressly retained "any rights the United States has in lands presently and actually occupied by the United States under claim of right." Section 5(a), 43 U.S.C. 1313(a).

Ten years later, as development of mineral resources continued to move seaward, the United States filed an amended bill in equity in this Court seeking a determination of California's coastline in order to ascertain where California's offshore lands ended and the United States' lands began. The Court's decision in *United States* v. *California*, 381 U.S. 139 (*California II*), defined "inland waters" as used in the Act, *id.* at 150-167, and settled various subsidiary issues, *id.* at 167-177; a supplemental decree was entered. 382 U.S. 448. A second supplemental decree, unrelated to the present dispute and not yet reported, was entered on June 13, 1977.

The issue now before this Court is whether the United States or the State of California controls the submerged lands and waters within one mile of Anacapa and Santa Barbara Islands. The issue arises because the disputed area is rich in kelp which, with the islands themselves, protects sea otters and other marine mammals which the United States is dedicated to preserving. California wishes to carry out its "program of leases for the harvesting of kelp" in the area (Cal. Br. 7). In addition, the undersea plant and animal life around the islands is a beautiful and scientifically valuable resource; indeed, because the islands themselves are not scenic, the underwater life is the prime attraction for skin divers, photographers and naturalists alike.

The first question presented is whether President Truman's 1949 proclamation added to the Monument the waters, resources and submerged lands within one mile of the islands. If so, the second question is whether the United States relinquished that area to California by the Submerged Lands Act or whether it retained the areas as "lands presently and actually occupied by the United States under claim of right," 43 U.S.C. 1313(a).

SUMMARY OF ARGUMENT

President Truman's 1949 proclamation added to the Monument all waters, submerged lands and natural resources within one mile of the islands and not, as California contends, merely the rocks and islets in that area. This Court has held that "lands" used in a reservation of public territory includes adjacent waters and submerged lands if such construction will achieve the purposes of the reservation, and "areas" is the most commodious word that could have been used to denote that more than just rocks and islets were included. The diagram incorporated into the proclamation also shows that all surrounding areas were included.

The history of the 1949 proclamation demonstrates that addition of adjacent waters and submerged lands was necessary to protect the marine life in and around the islands. After this Court's decree in *California I*, federal officials responsible for drafting the proclamation unequivocally stated that waters surrounding the islands were included in the proclamation. Indeed, "areas" was substituted at a late stage in the drafting process for "islets, rocks, and waters."

The contemporaneous interpretation of the proclamation by the United States and California further demonstrates that the expansion of the Monument included adjacent waters and submerged lands. By various public notices and correspondence, California recognized federal authority over these waters in

general and the kelp beds in particular. Federal regulations for the Monument are consistent only with the proposition that federal jurisdiction extends to the waters, submerged lands and natural resources surrounding the islands.

The United States did not relinquish any part of the disputed areas by enactment of the Submerged Lands Act in 1953, for Congress specifically excepted from that Act "any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U.S.C. 1313 (a). The parties have stipulated that the United States occupied the waters within the boundaries of the Monument. We believe it is clear that the 1949 proclamation is the claim of right which excepts the areas from the Act.

ARGUMENT

I. PRESIDENT TRUMAN ADDED THE AREAS IN QUESTION TO THE MONUMENT IN 1949

A. The proclamation added to the Monument all "areas," including lands, waters and natural resources, within one mile of the islands.

In 1949, President Truman proclaimed (Proclamation 2825, Jt. App. 67; hereafter "1949 proclamation") that "the areas within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands, as indicated on the diagram hereto attached and forming a part hereof, are withdrawn from all forms of appropriation under the public-land laws and added to and reserved as a part of the Channel Islands National Monument." The proclamation's diagram

(Jt. App. 68) shows each island surrounded by a line marked "boundary" one mile from the coast of the island.

California contends (Br. 17-21) that the proclamation did not purport to, and did not, add to the Monument anything but "certain rocks and islets" within the one-mile belt surrounding each island. We believe it is plain that the 1949 proclamation purported to, and did, add to the Monument all waters and lands, submerged or otherwise, within the one-mile belt.

It is as true for presidential proclamations as it is for statutes that "[t]he starting point in every case involving construction * * * is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (Powell, J., concurring). The "language itself" here demonstrates that the disputed lands are a part of the Monument. Webster's New International Dictionary, Second Edition, defines "area", *inter alia*, as synonymous with "[s]pace, region, [or] expanse." As California concedes (Br. 14-17), the word has been authoritatively used to "include space beneath the surface, such as submerged lands" (*id.* at 17). This Court has recognized that a reservation of "lands"—a word narrower than "areas"—"includes as well the adjacent waters and submerged land" if such a construction serves the purpose of the reservation. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87. See also *United States* v. *Louisiana*, 363 U.S. 1, 69; *Cappaert* v. *United States*, 426 U.S. 128, 138. As we

will show in part B below, the purpose of this reservation was to protect the marine life in the lands and waters within one mile of the islands, and therefore "areas" should be read to include "adjacent waters and submerged lands." Indeed, "areas" is the most commodious word that could have been used in this context to denote that everything within the boundaries, not merely "certain rocks and islets," was added to the Monument. The proclamation could have added all "surface waters, submerged waters, rocks, islets, submerged lands, natural resources" and so on *ad infinitum*, but it sensibly did not. It accomplished the same result by simply adding "areas." And, as we show below, "areas" was substituted in the later stages of drafting as an economical synonym for all things within the one-mile belt.

In addition to the word "areas" itself, the diagram (Jt. App. 68) which was incorporated into the proclamation and is as much a part of it as its very language, shows the one-mile boundary lines surrounding Anacapa and Santa Barbara Islands as enclosing "Approx. 9203 Ac[res]" and "Approx. 17835 Ac[res]," respectively. California acknowledges that these acreage figures describe the total surface area of the islands and surrounding waters, and not merely the "rocks and islets" contained therein (Jt. App. 2). Since California does not contend that the 1949 proclamation added merely surface waters to the Monument,[3]

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[3] Indeed, California argues that any such reading of the proclamation would exceed the authority conferred by the Antiquities Act of 1906. Cal. Br. 52-57.

the fact that the proclamation described the acreage in such terms is persuasive evidence that the proclamation included *all* waters and submerged lands, and not merely "rocks and islets"—a possibility California concedes (Br. 19). Indeed, there would have been no need to measure and record the acreage at all if the proclamation's only concern was with "rocks and islets." And if the proclamation was concerned only with rocks and islets, it is strange that no such features are depicted on the diagram, especially since the proclamation added to the Monument the areas "indicated on the diagram." Neither the materials in the Joint Appendix, nor any other material of which we are aware, nor California itself, identifies, either directly or indirectly, the "rocks and islets" which California contends are the genesis and the subject of the proclamation.[4] It is true that the first whereas clause of the proclamation states that "certain islets and rocks" near the islands are "required for

[4] California offers the suggestion that the diagram's line surrounding the islands, which is clearly labeled "Boundary," "could simply be an envelope line whose function is to indicate that no islets or rocks seaward of the line were added to the Monument by the 1949 proclamation" (Br. 18). But it offers no evidence in support of this speculation except another suggestion that the line in the diagram of the proclamation establishing the Fort Jefferson National Monument (Jt. App. 3-5) might also be an envelope line. The line in the Fort Jefferson National Monument diagram simply encloses those dozens of islands, keys, rocks and other formations in "the Dry Tortugas group of islands" (Jt. App. 3) which were to become the Monument; it provides no basis for treating the "boundary" line, labeled as such, in the present case as a so-called "envelope line" allegedly having a function different from that of a boundary line.

the proper care, management and protection" of the Monument's resources, but, as we show in part B below, this preamble does not define the range of concerns that led to the expansion of the Monument in the 1949 proclamation.

Had President Truman intended to include only islets and rocks in the 1949 expansion of the Channel Islands National Monument, he could have done so explicitly, as President Roosevelt had done with the "islands" in the 1938 proclamation. But the 1949 proclamation did not extend the boundary to include "rocks and islets within one nautical mile"; it extended the boundary to include all "areas within one nautical mile." The language of the proclamation, including the designation of a "boundary" on the accompanying diagram and the inclusion of acreage figures which include water areas, makes the proclamation clear on its face. It is therefore not surprising that California concedes that the areas added to the Monument "might not be the same as the 'certain islets and rocks' described in the first 'Whereas' clause" (Br. 18).

California also argues (Br. 19-20) that the submerged lands adjacent to these islands had previously been reserved by Executive Order 9633 of 1945, and the President therefore could not have intended to include them in the Monument. However, California's premise is erroneous. Executive Order 9633 set aside for the administrative control of the Secretary of the Interior only the natural resources of the continental shelf beneath the high seas. It had

no effect on lands submerged beneath the territorial sea, including the land surrounding these islands. See note 14, *infra*.

California states (Br. 20-21) that the 1949 proclamation as a whole is ambiguous and concedes that it indeed "may indicate an intent to add jurisdiction over * * * perhaps both the water areas and the submerged lands beneath them." This admission stops short of what the circumstances show. The plain words and diagram of the proclamation demonstrate that the President added to the Monument all things—land, water and natural resources, submerged or otherwise—within the boundary line and that California's narrow reading of the proclamation as adding simply "rocks and islets" is erroneous.[5]

[5] *Atwood* v. *Humble Oil & Refining Company*, 338 F.2d 502 (C.A. 5), on which California relies (Br. 16-17), does not support California's position. The lease in that case required the lessee-producer to designate "the area or areas" of the leased property on which it was producing minerals at the expiration of the lease as a condition of extending the lease for those areas. At the time of expiration, the lessee was producing from a single subterranean geological structure and designated the overlying surface as the "area" of production; the lessor contended that the lease required the producer to identify individual subterranean pools of hydrocarbons from which the minerals were being produced. The court concluded that the lessor's contention would fragment the geologic structure, continue the lease only as to the pools themselves, and terminate the lease as to those portions of the structure above, below and around the pools. The court found the lessor's reading of the lease "strained and artificial" and inconsistent with the intent of the lessor's predecessor who had negotiated the lease. *Id.* at 505-506. Thus, *Atwood* does not by any reading support petitioner's contention that "area" is a measurement of surface alone. And since gas and oil deposits are not located on the earth's surface, it is obvious that, while the area of production might be *described* in terms of surface measurement, the area itself, like the area set aside in the 1949 proclamation, was three-dimensional.

B. The History of the 1949 Proclamation and of the Monument Demonstrates an Intention to Add the Adjacent Waters and Submerged Lands to the Monument.

1. The "executive history" of the proclamation shows an intent to include the adjacent waters and submerged lands within the Monument.

It is clear from the language of the 1949 proclamation, including the diagram incorporated into that proclamation, that waters and submerged lands were added to the Channel Islands National Monument. For that reason we believe it is unnecessary to resort to the history of the proclamation to construe it. Nonetheless, the history of the 1949 proclamation, much of which is set forth in the Joint Appendix, supports the conclusion that water areas and submerged lands were included in the Monument.

In brief, this history (Jt. App. 9-65; see also Jt. App. 69-92) shows that following President Roosevelt's creation of the Channel Islands National Monument in 1938, naturalists and National Park Service (NPS) officials feared that the boundaries of the Monument, limited as they were to Santa Barbara and Anacapa Islands, were inadequate to protect the marine mammals and other natural resources in the vicinity of the islands.

Although all agreed that expansion of the Monument's boundaries was necessary to provide the desired protection, California and the federal government were then engaged in the first "tidelands" dispute and it was not clear which had paramount rights in the waters and submerged lands adjacent to the coast. However, after this Court determined in *California I* in 1947 that the federal government had paramount rights in the area, efforts began in earnest to extend the boundaries of the monument to include the water and submerged lands adjacent to the islands. These efforts culminated in the 1949 proclamation.

a. ***Early expressions of the need to expand the Monument's boundaries.***

As early as May 1940, just two years after the creation of the Channel Islands National Monument, its superintendent [6] stated that a "one-half or a mile ocean strip" around the Santa Barbara and Anacapa Islands should be added to the Monument to protect "very important bird nesting areas" (Jt. App. 9). The same official in 1941 noted the presence of sea elephants and sea otters on the islands and stated, "Our principal difficulty from a protection standpoint arises in the situation that we are able to give protection to these animals only as long as they are on our beaches; the moment they slip off

[6] The Monument at that time was under the jurisdiction of the Superintendent of the Sequoia National Park in California.

into the water we lose control over them" (Jt. App. 11-12). The head of the National Park Service's Section on National Park Wildlife agreed that " 'the chief protection needed is in the waters adjoining the islands' " and suggested that an extension of the Monument's boundaries "to include the surface of the adjacent ocean" be considered (Jt. App. 13).[7]

Little if any action was taken during the war, but the scope of the planned expansion broadened substantially in 1946 when the National Park Service's Chief Landscape Architect recommended that the Monument "extend off shore to protect the underwater life" so that tourists could observe at close range "nature's big underwater show" (Jt. App. 14-15). The Chief Counsel of the NPS cautioned that "Whether there is Federal jurisdiction over these waters * * * involves the question of Federal ownership of submerged coastal lands * * * now before the Supreme Court of the United States" in *California I*. "Any opinion as to Federal ownership, or jurisdiction," he concluded, "must be reserved until this case has been decided" (Jt. App. 17).[8]

[7] Although the wildlife chief had earlier stated that he "understood that the Monument cannot be extended to cover the actual surface of the surrounding ocean" (Jt. App. 10), he later discovered that such an expansion "has [not] ever been considered" (Jt. App. 13). Thus his earlier doubts are of little significance.

[8] This memorandum was written in response to the request of the Director of the NPS for "advice as to the extent of Federal jurisdiction into the *waters* adjacent to Channel Islands National Monument and the *rocks and islands*" adjacent to a

In the following months, there were a number of suggestions that Gull Island, lying off the shore of Santa Barbara, be added to the Monument (Jt. App. 18-39). The Director of NPS advocated extending NPS control to "various off-shore rocks and unnamed islets above the surface and within one mile radii" of Santa Barbara and Anacapa, *e.g.*, Jt. App. 29 (memo of June 12, 1947). In those pre-*California I* days, there was much uncertainty as to whether federal jurisdiction could be extended "over the water" (Jt. App. 25).

b. *The impact of California I.*

That uncertainty was resolved when this Court announced on October 27, 1947, its decree in *California I* (332 U.S. 804, 805) that

> The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.

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state park in California (Jt. App. 16, emphasis added), thus reflecting, even as early as 1946, NPS's consideration of extending Channel Islands National Monument to adjacent waters, and not merely to rocks and islets.

Within weeks of this decree, on December 16, 1947, the Director of the National Park Service, who, as noted above, had earlier recommended adding only "rocks and * * * islets" to the Monument (Jt. App. 29), permanently expanded the scope of the boundary change. In a memorandum to the Regional Director in San Francisco, he noted, in reference to *California I*, "the situation with respect to the boundary of Channel Islands National Monument has changed considerably since the Boundary Status Report for that area was prepared last year", and stated "we are proceeding with the preparation of a proclamation to add to the monument all islets, rocks, *and waters* within one nautical mile of Santa Barbara and Anacapa Islands * * *" (Jt. App. 42, emphasis added).[9]

From this point forward in the executive history of the 1949 proclamation, there is no further authoritative reference to the addition of mere "rocks and islets." [10]

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[9] California's brief (Br. 28) erroneously dates this memorandum as June 16, 1947, rather than its true date, December 16, 1947. The difference is important because this Court did not announce its decision in *California I* until June 23, 1947 (332 U.S. 19); that decision and its subsequent decree induced the federal government to include waters and submerged lands in the Monument's expansion.

[10] The Regional Director in San Francisco, forwarding the Director's December 16 memorandum to the Monument's superintendent, referred to the pending proclamation as adding only rocks and islets (Jt. App. 43-45). Insofar as the forwarding memorandum omitted any reference to waters, it obviously did not fully state the Director's explicit intent

c. *The drafting of the proclamation.*

The expanded scope of the boundary change induced by *California I* is confirmed by the final stages of the proclamation's history. The 1948 letter from the Secretary of the Interior to the President stated in its draft form,

> I recommend that you sign the attached form of proclamation which would place under administrative control of the National Park Service *the islets, rocks, and waters* within a distance of one nautical mile from Santa Barbara and Anacapa Islands. This will afford proper protection to the seals, sea lions, and sea elephants. Some of these species are rare and need absolute protection if they are not to become extinct in American waters. [Jt. App. 46, emphasis added.]

The actual letter to the President, which the Secretary of the Interior signed a few months later, stated

> I recommend that you sign the attached form of proclamation, which would place under administrative control of the National Park Service *the area* within a distance of one nautical mile from the shoreline of Anacapa and Santa Barbara Islands. This will afford proper protection to the seals, sea lions, and sea elephants. Some of these species are rare and need absolute protection if they are not to become extinct in American waters. [Jt. App. 51, emphasis added.]

stated in the December 16 memorandum. The most that can be said in California's favor (Cal. Br. 28-29) is that the Regional Director did not discuss the question whether waters were included. Thus this lack of reference to waters is not significant. In any event, when the Regional Director replied to the NPS Director's memorandum some four weeks later, he correctly referred to the proposal as adding "islets, rocks and waters" (Jt. App. 49; see also Jt. App. 48, 60-61).

There is no evidence that the substitution of "area" in the letter for "islets, rocks and waters" in the draft was meant to be anything other than synonymous. The Secretary simply followed the admirable rule of not using four words where one would do. Furthermore, if, as California contends (Br. 30), "area" was meant to denote only rocks and islets, and not waters, it would have been simpler—and far clearer—to strike the words "and waters" from the draft, as California appears to concede (*ibid.*).[11] There is, in short, no evidence to show, and no reason to believe, that the Secretary meant "area" to be a material change from the "islets, rocks, and waters"

[11] The Secretary's letter referred to "[s]imilar protection" to marine life in the Fort Jefferson National Monument in Florida (see Jt. App. 3-5). Regulations protecting fish, coral, shells and other underwater life had been in effect there since 1939 (4 Fed. Reg. 4958), and specific reliance on this precedent further supports the conclusion that the 1949 proclamation had the same purpose.

California's argument (Br. 31-32) that the Fort Jefferson National Monument did not include water areas because the deed of cession from Florida gave the federal government title only to the islands is not apt. The cession of lands was necessary to create a national monument; they had belonged Florida. The submerged lands belonged to the United States and thus no cession was required. *California I, supra; United States* v. *Louisiana*, 339 U.S. 699; *United States* v. *Texas*, 339 U.S. 707.

used in the earlier draft.[12] The President signed the proclamation virtually as the Secretary had sent it to him.[13]

These circumstances underscore the pertinence to this dispute of the rule of construction enunciated in *Alaska Pacific Fisheries* v. *United States*, *supra*, page 8, that a reservation of lands includes adjacent waters and submerged lands if necessary to carry out the purpose of the reservation.

Again, California is forced to admit (Br. 37) that the proclamation's history, like the proclamation itself, does not fully support the State's position; again, the

[12] The formal changes made by the Department of Justice (Jt. App. 57-59, 62-65; see Cal. Br. 34-36) are without significance to the present dispute. The Assistant Solicitor General excised from the proposed proclamation the stated purpose of "protection of * * * marine life" (compare Jt. App. 53 with Jt. App. 67) because he doubted that the Antiquities Act, 34 Stat. 225, see note 1, *supra*, "permits the establishment or enlargement of a national monument to protect plant and animal life" (Jt. App. 63). Regardless of whether this cautious approach was required by the Antiquities Act (and it probably was not, see *Cappaert* v. *United States*, 426 U.S. 128, 141-142), it does not detract from the uncontradicted evidence that enlargement was in fact motivated by the desire and intent, demonstrated by federal officials at every level, to protect marine life. See Jt. App. 9, 10, 11-15, 18-20, 22, 28, 37, 38, 40-44, 46, 48, 51, 53, 57-58, 60-61. The Assistant Solicitor General confirmed the purely formal nature of his revision by stating that "no change has been made in substance" (Jt. App. 63).

[13] At some point, "area" in the Secretary's draft (Jt. App. 54) became "areas" in the official proclamation. Perhaps "areas" was substituted to denote more clearly waters and submerged lands and to avoid any possible connotation of surface measurement that might be read into "area."

admission is unduly conservative. The history of the proclamation, like the language itself, fully supports the United States' position.

2. The contemporaneous interpretation of the proclamation by California and the United States, and the United States' subsequent administration of the Monument, further demonstrate that the proclamation extended federal control over the waters and submerged lands.

It is well established that "[g]enerally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." *Old Colony Trust Company* v. *City of Omaha*, 230 U.S. 100, 118. Although the 1949 proclamation was not a contract, like a contract it rearranged rights and obligations between California and the United States concerning the areas surrounding Santa Barbara and Anacapa Islands, and therefore the contemporaneous interpretation of that proclamation by both parties is entitled to great weight. As we now show, the United States promptly informed California that the 1949 proclamation enlarged the Monument to include waters, natural resources and submerged lands, and California accepted that position.

A question of the Monument's boundary arose almost immediately after it was extended. Following this Court's decision in *California I*, the NPS was informed that the California legislature had redefined the State's boundaries to "run outside the

Channel Islands" (Jt. App. 69). When asked whether this action could affect federal jurisdiction over the Monument, the Chief Counsel of the National Park Service gave his opinion that "the State act * * * can [not] affect Federal control and ownership of lands within Channel Islands National Monument * * *" (*ibid.*). He concluded that, because "the three-mile marginal belt in this case would necessarily encircle the islands and *include the submerged areas recently added* to Channel Islands National Monument," the California legislation would be ineffective (*id.* at 70, emphasis added).

The National Park Service informed the State of California of these views on June 13, 1949, emphasizing that "our Channel Islands National Monument embraces the Anacapa and Santa Barbara Islands *as well as the waters for one nautical mile surrounding those islands* * * *" (Jt. App. 71, emphasis in original). Within a month the California Department of Natural Resources published a notice which acknowledged that:

> The National Park Service has just called to our attention the fact that Santa Barbara and Anacapa Islands, and the waters surrounding said islands to a distance of one nautical mile, comprise the Channel Islands National Monument.
>
> The National Park Service also advises us that they will not permit any use of explosives for any purpose within the boundaries of this National Monument.

> In the exercise of any permit previously issued by the California Fish and Game Commission to use explosives for seismic operations, or in the exercise of any permit which may be granted in the future, you will please be governed by this notice. [Jt. App. 73.]

Thus, within a few months of the signing of the 1949 proclamation, California clearly recognized and acceded to federal jurisdiction over the waters in the one-mile belt surrounding the islands. This notice is of particular significance in this case because it is inconsistent with California's present contention that it controls these waters. See, *e.g.*, 4 Wigmore, *Evidence*, Section 1048 (Chadbourn rev. 1972).

Less than a year after the 1949 proclamation the question which is now at the heart of this litigation arose—whether kelp harvesting within the one-mile belt would be permitted. In February 1950, the Monument Superintendent foresaw the pressure that later developed "to harvest kelp in monument waters" (Jt. App. 75). Within a few months, California again recognized the authority of the NPS over natural resources—and the kelp beds in particular—when a California official wrote to NPS as follows (Jt. App. 76):

State of California
Department of Natural Resources
Division of Fish and Game

* * * *

June 14, 1950.

National Park Service
Washington, D.C.

Gentlemen:

We have seen reports in the Los Angeles press to the effect that the National Park Service is planning to license fishing resort facilities at the Anacapa Island National Monument. The reports indicate that the National Park Service will prohibit commercial fishing and kelp harvesting in the waters surrounding the Island.

Would you please advise us what your intentions may be. The commercial fishermen and kelp companies operating in this area have expressed concern to us; but before making any representations, we should like to know what is planned.

Very truly yours,

/s/ E. L. Macaulay
E. L. MACAULAY
Executive Officer

California could hardly have expressed its recognition of federal jurisdiction over the kelp beds more explicitly. It raised not the slightest assertion of the State's authority nor the slightest question as to federal authority. California asked only for information of what the federal government intended to do about kelp harvesting.

NPS' response to California's inquiry unfortunately does not survive, but contemporaneous documents reveal that the reply informed California of NPS' position that "the kelp beds are essential for wildlife protection and should not be disturbed." Jt. App. 77; see *id.* at 79. So far as the parties to this case have discovered, California raised no further question of federal authority.

The federal government, acting through the Department of the Interior, has not deviated from its position that since 1949 the Channel Islands National Monument includes all submerged lands and water areas within one mile of Santa Barbara and Anacapa Islands.[14] In response to an inquiry from

[14] California argues (Br. 42-51) that the submerged lands at issue here could not have been added to the Monument in 1949 because President Truman had reserved such lands in 1945 by Executive Order 9633 (Cal. Br. App. 107) and the 1949 proclamation did not *pro tanto* repeal the 1945 order. This argument fails both in premise and conclusion. In the first place, the 1945 order concerned only resources of "the continental shelf beneath the high seas but contiguous to the coasts of the United States." *Ibid.* The lands at issue here are indisputably beneath territorial waters, and California errs in its argument (Br. 43-48) that "contiguous" modifies "high seas" so as to include territorial waters. See Convention on the High Seas, Art. 1, 13 U.S.T. 2312; Whiteman, 4 *Digest of International Law* 499-501 (1965). California's strained interpretation of Senate testimony and the United States' 1947 brief in the present case (Br. 46-48) to support its reading is erroneous; those documents plainly refer to high seas and not territorial waters.

Second, California acknowledges (Br. 49-51) that any reservation of the disputed lands by the 1945 order could be im-

Congressman Hinshaw about the Monument in 1951, the Acting Director of the Park Service explained (Jt. App. 80-82):

> The aquatic life in both the animal and vegetable kingdoms offer outstanding exhibits in the offshore waters. One of the most important steps taken in behalf of the Channel Islands was the declaration of President Truman in February 1949 extending the monument to include the waters for a mile offshore. A protection of this marine life is of vital importance. * * * [T]he giant growths of kelp which drift offshore on these Islands, and off the sections of the mainland, correspond in undersea life to the giant Sequoias in life above sea level.

Federal regulations applicable to Channel Islands National Monument, 36 C.F.R. 7.84, prohibit tampering with "any underwater growth or formation" and forbid any person to "dig in the bottom, or in any other way injure or impair the natural beauty of the underwater scene." The regulations also prohibit tampering with wrecks and restrict the taking of fish "or other marine life." The regulations are consistent only with the position that federal jurisdiction extends to all waters, submerged lands and natural resources within the one-mile boundary. This Court stated in *Udall* v. *Tallman*, 380 U.S. 1, 16, which also involved the Secretary of the Interior's admin-

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plicitly revoked *pro tanto* by the 1949 proclamation. Assuming *arguendo* that it is necessary to reach this issue, we think the terms of the 1949 proclamation are certainly clear enough to constitute such revocation.

istration of a presidential order reserving public lands for the protection of wildlife:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." * * * "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" [Citations omitted].

The 1949 proclamation's history, contemporaneous interpretation by both parties and subsequent enforcement thus unequivocally reinforce the language of the proclamation itself. The lands, waters and natural resources of the one-mile belt became part of the Monument in 1949. As we will now show, they were not given back to California in 1953.

II. THE SUBMERGED LANDS ACT DID NOT SURRENDER THE LANDS IN QUESTION TO CALIFORNIA

As we have shown in point I, *supra*, the 1949 proclamation reserved to the United States the lands, waters and natural resources within one mile of

Anacapa and Santa Barbara Islands. California contends (Br. 58-84) that the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, returned these areas to California. We disagree. That Act declared, as a general matter, that the States had title to the lands and resources within three miles of their respective coastlines, 43 U.S.C. 1311, 1301 (b), but Congress specifically excepted from the operation of the Act "any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U.S.C. 1313 (a). The United States, as stipulated (Jt. App. 1), "presently and actually occupied" the areas covered by the 1949 proclamation. Therefore, the only question is whether it did so "under claim of right." We believe it obvious that the United States did so, and that therefore the Act has no effect on the question to be decided by this Court.

As the legislative history quoted by California demonstrates (Cal. Br. 65-73 *passim*), the "claim of right" exception was added to the Act to preserve to the United States any claims it had to lands it occupied within the area that the Act otherwise would give to the States.[15] We agree with California that the legislative history shows, in the words of Senator Holland, that (Cal. Br. 75):

> it was the purpose of this particular exception to leave the Federal Government exactly in the

[15] Contrary to California's apprehensions (Cal. Br. 72, 76, 78), the United States does not base its claim to the disputed areas on the Submerged Lands Act itself.

> position it now occupies, with such rights as it may have, and with such obligations or responsibilities as it may have, with reference to any lands which it presently and actually occupies by reason of building and maintaining on such lands, installations and the like, under claim of right.

We further agree that the claim of right exception does not preserve to the United States any claim resting solely on the doctrine of paramount right announced by this Court in *California I* (Cal. Br. 76). But no such claim is at issue here. The United States occupied the islands, waters and submerged lands of the Channel Islands National Monument plainly by virtue of President Roosevelt's 1938 proclamation establishing it and President Truman's 1949 proclamation expanding it. Indeed it is hard to imagine a "claim of right" more explicit than a statement by the President of the United States officially proclaiming that the areas are reserved "under and by virtue of the authority vested in" him by a public law passed for just such a purpose by the Congress (Jt. App. 67).

California contends (Br. 79) that the 1949 proclamation was not a "claim of right" because, California urges, a claim of right must be a federal title to the lands, established prior to the proclamation reserving them: "The federal government must claim these lands because it owns or controls them, not just because it reserved them." We are at a loss to understand the significance of this purported distinction,

for which California cites no language in the Act or its history, nor any judicial or other authority. There is not the slightest evidence in the Act or its history that the claim of right must be a formal title. In fact, the contrary is true. Senator Kuchel of California asked, "What does 'claim of right' mean?" Senator Cordon, floor manager of the bill, answered, "Well, it means that the United States is in actual occupancy and claims it has a right to the occupancy." Hearings on S.J. Res. 13 *et al.* (Submerged Lands) before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. 1321 (1953).

California's misapprehension may be based on Senator Kuchel's next question:

> Senator Kuchel: And it permits the United States to keep the property in the absence of a title?
>
> Senator Cordon: No; it does not. It leaves the question of whether it is a good claim or not a good claim exactly where it was before. This is simply an exception by the United States of a voluntary release of its claim, whatever it is. It does not, in anywise, validate the claim or prejudice it. [*Ibid.*].

Senator Cordon plainly was saying that the "claim of right" exception preserved whatever rights in land were claimed by the United States, leaving the validity of the claim to another day. California's argument that title is required to except land from the Act amounts to a contention that all claims unsupported by a title were extinguished; that argument is explicitly rejected by Senator Cordon's reply that the

claim of right exception "does not, in anywise, validate the claim or prejudice it."

This exchange was not isolated; Senator Cordon explained again to Senator Kuchel that:

> The bill is a conveyance. Unless we except from the conveyance a tract of ground, *the title of which is in dispute*, and unless we except that we end the dispute, but we end it adversely to the United States." [*Id.* at 1421; emphasis added.]

California protests (Br. 79) that unless "claim" is in effect rewritten by this Court to mean "title," "the federal government could reserve any property owned by another and have a claim of right." In the first place, the land here was not owned by California in 1949; this Court declared in 1947 in *California I* that the State "ha[d] no title thereto or property interest therein." 332 U.S. 804, 805.

In any event, the fact that the government could "reserve any property owned by another and have a claim of right" is irrelevant. The government's claim would be just that—a claim, not a title. The Submerged Lands Act allows the State to contest the validity of any such claim, because, as Senator Cordon stated, "We simply recognize that a claim on the part of the United States exists, and we leave it for the same determination that would be made had no decision of any kind ever been made." Hearings, *supra*, at 1321. Aside from the contention that a "claim" must be supported by a title, California has not mounted any serious attack on the validity of the United States' claim to the "areas" added to the Chan-

nel Islands National Monument in 1949,[16] nor could it do so, since the land at that time was under the complete control of the United States by virtue of this Court's decision in *California I.* California's challenge to the 1949 proclamation is not that it was invalid, but only that, properly read, it added less territory than the United States believes.

Accordingly, California's position (Cal. Br. 79) that the claim of right must be a federal title to these lands, and that the 1949 proclamation reserving the lands is not a "claim," is contrary to the plain language of the Act and to its history.[17]

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[16] See n. 14, *supra.*

[17] California objects (Br. 85-87) to the limitation, in the third paragraph of the United States' Proposed Supplemental Decree, of the State's rights to a distance of 3 miles from the coastline of Anacapa and Santa Barbara Islands. California asserts that its Submerged Lands Act grant of 3 miles is to be measured from any other island or low-tide elevation within 3 miles of the coastline of Anacapa and Santa Barbara Islands. That grant does extend 3 nautical miles from Anacapa and Santa Barbara Islands, and from any other portion of the State's coastline, including low-tide elevations and other islands. However, this proceeding concerns only the boundaries of the Channel Islands National Monument and the effect of those boundaries on the respective rights of the parties to resources of that portion of the seabed. It does not present the question of the determination of the State's coastline for Submerged Lands Act purposes. Nonetheless there are two objections to the language offered by the State. First, it fails, of course, to recognize federal rights to submerged lands within the boundaries of the Monument. Second, it measures California's grant in terms of the limit of the territorial sea, whereas the Submerged Lands Act limits the grant to California to a distance of 3 nautical miles from the coastline. We believe that the State's objection would be overcome by amending the final clause of the third paragraph of the federal government's proposed decree to read, "to a distance of 3 nautical miles from the coastline of California."

CONCLUSION

For the foregoing reasons, this Court should enter a decree in the form proposed by the United States.[18]

Respectfully submitted.

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NOVEMBER 1977.

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[18] In the first paragraph of the proposed decree "excluding the tidelands" should be substituted for "including the tidelands."

An amended decree incorporating this change, and that discussed in note 17, *supra,* is attached as an appendix hereto.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 5, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

PROPOSED THIRD SUPPLEMENTAL DECREE, AS AMENDED

It is adjudged and decreed that:

1. As against the State of California and all persons claiming under it, the United States owns all of the islands, islets and rocks, excluding the tidelands (defined as the lands between the line of mean high water and the line of mean lower low water), of those islands and islets located within the Channel Islands National Monument established by Presidential Proclamation No. 2281, 52 Stat. 1541, and expanded by Presidential Proclamation No. 2825, 63 Stat. 1258. The State of California has no legal interest in these islands, islets, and rocks.

2. As against the State of California and all persons claiming under it, the United States owns the submerged lands and natural resources located within one geographical mile of the coastlines of Anacapa and Santa Barbara Islands. The State of California has no legal interest in these lands and natural resources.

3. Subject to the powers reserved to the United States by Sections 3(d) and 6 of the Submerged Lands Act, 67 Stat. 31, 32, 43 U.S.C. 1311(d), 1314, the State of California has an interest superior to that of the United States in the submerged lands and natural resources underlying the waters of the Pacific Ocean more than one nautical mile from the coastline of Anacapa and Santa Barbara Islands seaward, to a distance of three nautical miles from the coastline of California.

4. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be necessary or advisable to interpret or give proper effect to this Decree.

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